

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF OREGON

3 PORTLAND DIVISION

4

5 EXACT ORDER SPECIALTIES, an Oregon)
Sole Proprietorship,)
6)
7 Plaintiff,) No. 03:12-cv-00631-HU
8)
vs.)
9 GLOW INDUSTRIES, INC., an Ohio))
corporation; JASON GLOWACKI, an))
individual; and DOES 1-10;) **MEMORANDUM OPINION AND ORDER**
10)
Defendants.))
11

12

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3 HUBEL, Magistrate Judge:

4 The plaintiff Exact Order Specialties ("Exact") brings this
5 action for trademark infringement against the defendants Glow
6 Industries, Inc. ("Glow"); Jason Glowacki ("Glowacki"); and Does 1-
7 10. The matter is before the court on Glow's Motion to Transfer
8 Venue (Dkt. #31), and Glowacki's Motion to Dismiss for Lack of
9 Personal Jurisdiction (Dkt. #36).

10 Exact, an Oregon corporation, is in the business of designing
11 and manufacturing various products, "including musical instruments,
12 guitar jack sockets, and premium smoking pipes." Dkt. #35, p. 3
13 (citing Dkt. #27, First Am. Cmpt., ¶ 11). Among other things,
14 Exact designs, manufactures, markets, and sells a small, portable
15 smoking pipe called the "Monkey Pipe." According to Exact, the
16 pipe is "made from high quality, hand finished hardwoods," and is
17 one of Exact's most popular products. *Id.* (citing Dkt. #27, ¶ 12).
18 On each Monkey Pipe, Exact places its "Exact Order Specialties Eye"
19 logo design (the "EOS Eye Logo"). Exact maintains federally-
20 registered trademarks for the EOS Eye Logo (Reg. No. 3,060,212),
21 and the term "Monkey Pipe" (Reg. No. 3,883,064). Exact claims its
22 EOS Eye Logo "is widely recognized by the consuming public of the
23 United States." Dkt. #27, ¶ 19.

24 According to Exact, a Glow employee named Brian Nupp contacted
25 Exact twice in February 2010, to express Glow's interest in whole-
26 saling Monkey Pipes. Dkt. #27, ¶¶ 25 & 26; Dkt. #35, p. 3. Jason
27 Davis, on behalf of Exact, corresponded with Nupp twice in March
28 2010, via e-mail, regarding Glow's inquiry. Exact claims that on

1 March 15, 2010, Nupp renewed Glow's interest in wholesaling Monkey
2 Pipes, if Glow could receive certain payment terms. Dkt. #27,
3 ¶ 28. However, Glow never submitted a purchase order for the
4 Monkey Pipes. Dkt. #27, ¶ 29; Dkt. #35, p. 3.

5 According to Glow, in October 2011, it "purchased 1,010 pipes
6 at \$3.00 per pipe (\$3,030 worth of total product) from a company in
7 California that is not a party to this case." Dkt. #32, p. 2.
8 Glow then sold those pipes wholesale to various buyers, including
9 two sales to entities in Oregon: (1) a sale of ten pipes on
10 October 12, 2011, "at a total cost of \$62.50 to Magic Mushroom Lamp
11 Co. in Sutherlin, Oregon"; and (2) a sale of one pipe on Decem-
12 ber 6, 2011, "at a total cost of \$6.00 to Flashback T's in Coos
13 Bay, Oregon." *Id.*

14 Exact alleges the pipes sold by Glow to customers in Oregon
15 were called "USA Made Monkey Pipe[s]," featuring a copy of the EOS
16 Eye Logo, and bearing a false trademark symbol. Exact claims these
17 pipes were "an obvious, low quality knock-off of the Monkey Pipe,"
18 that infringed Exact's marks. Dkt. #27, ¶¶ 30, 32; Dkt. #35, p. 3.
19 Exact alleges Glow's sale of the knock-off Monkey Pipes has damaged
20 Exact's business, reputation, and goodwill, and Glow's sale of the
21 counterfeit pipes "is likely to cause confusion, mistake, and
22 deception by creating the false and misleading impression that
23 [Glow's] goods are manufactured or distributed by [Exact], or are
24 associated or connected with [Exact], or have the sponsorship,
25 approval, or endorsement of [Exact]." Dkt. #27, ¶ 45.

26 Exact filed this action on April 10, 2012, alleging federal
27 and state claims for trademark infringement and counterfeiting
28 against Glow, David Glowacki, Brian Nupp, and "Does 1-10." Dkt.

1 #1. On May 25, 2012, Glow filed a motion to transfer venue, Dkt.
2 #22, and the defendants David Glowacki and Brian Nupp filed a
3 motion to dismiss for lack of personal jurisdiction, Dkt. #24.
4 Exact filed its First Amended Complaint on June 4, 2012, deleting
5 David Glowacki and Brian Nupp as defendants, and adding Jason
6 Glowacki as a defendant. Dkt. #27; see Dkt. #37, p. 2. As a
7 result of Exact's filing of the Amended Complaint, the court found
8 the motion to transfer venue and motion to dismiss to be moot.
9 Dkt. #29. Glow filed its current motion to transfer venue on
10 June 18, 2012, Dkt. #31, and the defendant Jason Glowacki filed his
11 current motion to dismiss for lack of personal jurisdiction on
12 July 3, 2012, Dkt. #36. According to Exact, Glowacki "has been
13 served but has not yet appeared in this action." Dkt. #35, p. 4.

14 The current motions are fully briefed, and no party has
15 requested oral argument. I will address Glowacki's motion to
16 dismiss first, and then turn to consideration of Glow's motion to
17 transfer venue.

18

19 **MOTION TO DISMISS**

20 Glowacki moves to dismiss Exact's case against him on the
21 basis that this court lacks personal jurisdiction over him. I
22 first will address Exact's argument that Glowacki failed to comply
23 with Local Rule 7-1, "because he did not make a good faith effort
24 through personal or telephone conference to resolve the dispute
25 with [Exact] despite certifying that he had done so." Dkt. #40,
26 p. 2. Exact's counsel has filed a declaration stating he never had
27 any personal or telephone conversation with any attorney for Jason
28 Glowacki regarding the present motion to dismiss. Dkt. #41.

1 Counsel describes contacts he had with defense counsel regarding
2 the previous motion to dismiss filed by David Glowacki and Brian
3 Nupp, and a conversation with Jason Glowacki's attorney after the
4 current motion was filed, during which defense counsel indicated he
5 believed he had complied with the Local Rule. *Id.* Exact argues
6 Glowacki's motion should be denied on the basis that no good-faith
7 effort was made to comply with the Local Rule.

8 "The obvious purpose of Local Rule 7-1(a) is to encourage
9 parties to resolve disputes amicably when possible, preserving
10 judicial resources for those matters that require the court's
11 intervention." *Thompson v. Federico*, 324 F. Supp. 2d 1152, 1172
12 (D. Or. 2004) (Mosman, J.); accord *Gerke v. Travelers Cas. Ins.*
13 Co., 815 F. Supp. 2d 1190, 1198 (D. Or. 2011) (citing *Thompson*).
14 Here, the parties' counsel had some conversation regarding the
15 defendants' failure to comply with the Local Rule in connection
16 with the previous motion filed by David Glowacki and Brian Nupp.
17 Despite that conversation, Exact's counsel contends defense counsel
18 once again failed to comply properly with the Local Rule in
19 connection with Jason Glowacki's motion. According to Exact's
20 counsel, defense counsel asserted that because the parties had
21 discussed the jurisdictional issue in connection with the prior
22 motion to dismiss, "he believed he understood [Exact's] position on
23 the issue and that the requirement for conference was therefore
24 satisfied." Dkt. #41, ¶ 12. Glowacki's attorney has filed a
25 declaration detailing the attorneys' conversations from his point
26 of view, and indicating his belief that he did, in fact, make a
27 good-faith effort to comply with the Local Rule. Dkt. #45.

28

1 From the attorneys' descriptions of their conversations, it
2 appears their respective intentions and understandings were less
3 than crystal clear. However, I find Glowacki's counsel complied
4 with the Local Rule for purposes of the current motion to dismiss.
5 Even if I found otherwise, however, I would not deny the motion on
6 that basis at this juncture. It is clear from the attorneys'
7 conversations that if Glowacki's motion were denied on procedural
8 grounds, he immediately would seek leave to refile the motion.
9 Preservation of judicial resources is served by considering the
10 motion now, on its merits.

11 Turning, therefore, to the merits of Glowacki's motion, Chief
12 Judge Aiken of this court recently set forth the standards
13 applicable to motions of the type filed by Glowacki, in *Videz, Inc.*
14 v. *Micro Enhanced Technology, Inc.*, slip op., 2012 WL 1597380
15 (D. Or. May 4, 2012):

16 "‘Determining whether personal jurisdiction exists over an out-of-state defendant involves two inquiries: whether a forum state’s long-arm statute permits service of process, and whether the assertion of personal jurisdiction would violate due process.’” *Avocent Huntsville Corp. v. Aten Int’l Co., Ltd.*, 552 F.3d 1324, 1329 (Fed. Cir. 2008) (quoting *Inamed Corp. v. Kuzmak*, 249 F.3d 1356, 1359 (Fed. Cir. 2001)). Oregon’s catch-all jurisdictional rule confers personal jurisdiction coextensive with due process. Or. R. Civ. P. 4L. Thus, the analysis collapses into a single framework and the court proceeds under federal due process standards. *Id.*; *Deprenyl Animal Health, Inc. v. Univ. of Toronto Innovations Found.*, 297 F.3d 1343, 1350 (Fed. Cir. 2002).

25 Due process requires that a defendant, if not present in the state, “‘have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.’” *Avocent*, 522 F.3d at 1329 (quoting

1 *Int'l Shoe Co. [v.] Washington*, 326 U.S. 310,
 2 316[, 66 S. Ct. 154, 158, 90 L. Ed. 95]
 3 (1945)). Minimum contacts may be demonstrated
 4 through facts supporting general or specific
 5 jurisdiction over the defendant. See *Helicop-*
 6 *teros Nacionales de Colombia, S.A. v. Hall*,
 7 466 U.S. 408, 414 & n.8[, 104 S. Ct. 1868,
 8 1872 & n.8, 80 L. Ed. 2d 404] (1984). A
 9 plaintiff need only make a "prima facie
 10 showing" that a defendant is subject to per-
 11 sonal jurisdiction. *Silent Drive, Inc. v.*
 12 *Strong Indus., Inc.*, 326 F.3d 1194, 1201 (Fed.
 13 Cir. 2003).

14 Videz, 2012 WL 1597380 at *1.

15 Here, Exact expressly acknowledges that it "does not possess
 16 facts sufficient to know whether Glowacki is subject to general
 17 jurisdiction in Oregon." Dkt. #40, p. 5 n.1. Nor could Exact
 18 show, on the facts as pled, that Glowacki has engaged in the type
 19 of "continuous and systematic general business contacts" approxi-
 20 mating a "physical presence" in Oregon, sufficient to assert
 21 general jurisdiction over him. See *id.* Instead, Exact claims the
 22 court has specific jurisdiction over Glowacki. Dkt. #40, pp. 6-10.

23 The Ninth Circuit has established a three-part test to deter-
 24 mine whether the court's exercise of specific jurisdiction over a
 25 nonresident defendant is appropriate:

- 26 "(1) The non-resident defendant must purposefully
 27 direct his activities or consummate some
 28 transaction with the forum or resident there-
 29 of; or perform some act by which he purpose-
 30 fully avails himself of the privilege of
 31 conducting activities in the forum, thereby
 32 invoking the benefits and protections of its
 33 laws;
- 34 (2) the claim must be one which arises out of or
 35 relates to the defendant's forum-related acti-
 36 ties; and
- 37 (3) the exercise of jurisdiction must comport with
 38 fair play and substantial justice, i.e. it
 39 must be reasonable."

1 *Boschetto*, 539 F.3d at 1016 (quoting *Schwarzenegger v. Fred Martin*
2 *Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004), in turn citing *Lake*
3 *v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)). “The plaintiff
4 bears the burden on the first two prongs.” *Id.* If the first two
5 prongs are established, then the burden shifts to the defendant to
6 “come forward with a ‘compelling case’ that the exercise of
7 jurisdiction would not be reasonable.” *Id.* (citations omitted).
8 If the first two prongs are not established, then the case must be
9 dismissed. *Id.* Notably, if the court “decides the motion without
10 an evidentiary hearing, which is the case here, then ‘the plaintiff
11 need only make a prima facie showing of the jurisdictional facts.’”
12 *Id.*, 539 F.3d at 1015 (quoting *Caruth v. Int'l Psychoanalytical*
13 *Ass'n*, 59 F.3d 126, 127-28 (9th Cir. 1995)). The court takes as
14 true the uncontested allegations in the plaintiff’s Complaint,
15 and resolves conflicts between the parties’ affidavits in the
16 plaintiff’s favor. *Id.* (citations omitted).

17 Exact makes only one allegation against Glowacki, indi-
18 vidually; i.e., it claims, “[u]pon information and belief,” that
19 Glowacki is Glow’s President and CEO. Dkt. #27, ¶ 4. Exact
20 alleges its only contacts with Glow were through a Glow vice
21 president named Brian Nupp. *Id.*, ¶¶ 25-28. Besides describing e-
22 mail contacts with Nupp, Exact’s other allegations in its Amended
23 Complaint refer to the “Defendants,” without distinguishing any
24 actions allegedly taken by any individual on Glow’s behalf. See
25 Dkt. #27.

26 Nevertheless, Exact argues Glowacki is subject to personal
27 jurisdiction because he “is not merely associated with Glow: he is
28 the senior officer of Glow, the President and CEO, and presumably

1 director of its strategies and activities." Dkt. #40, p. 8
 2 (emphasis added). Exact argues, therefore, that Glowacki must have
 3 been a "primary participant" in the alleged offending activities,
 4 rendering the fiduciary shield doctrine inapplicable to him. *Id.*,
 5 pp. 6-9.

6 The "fiduciary shield" doctrine, generally, protects a cor-
 7 porate official from personal jurisdiction in a forum where the
 8 individual's only contacts arose in the performance of official
 9 duties on the corporation's behalf. See *Sidco Indus. v. Wilmar*
 10 *Tahoe Corp.*, 768 F. Supp. 1343, 1349 (D. Or. 1991) (Frye, J.) ("A
 11 corporate officer who has contact with a forum only in the
 12 performance of his official duties is not subject to the personal
 13 jurisdiction of the courts in that forum."). However, the
 14 fiduciary shield may be disregarded "in cases in which the
 15 corporation is the agent or alter ego of the individual defendant
 16 . . . or where there is an identity of interests between the
 17 corporation and the individuals." *Davis v. Metro Prod., Inc.*, 885
 18 F.2d 515, 520-21 (9th Cir. 1989) (citations omitted). The mere
 19 status of an individual as an employee of a corporation does not
 20 insulate the individual from personal jurisdiction. "'Each defen-
 21 dant's contacts with the forum State must be assessed indi-
 22 vidually.'" *Id.* at 521 (quoting *Calder v. Jones*, 465 U.S. 783,
 23 790, 104 S. Ct. 1482, 1487, 79 L. Ed. 2d 804 (1984)).

24 Here, Exact has made no allegations regarding Glowacki's
 25 individual actions, either inside or outside the State of Oregon.
 26 Exact's sole allegation is that Glowacki is President and CEO of
 27 Glow, and he therefore "presumably" participated in Glow's activi-
 28 ties within the state. This simply is not enough. Even in cases

1 where the individual defendant had *some* activities in Oregon (as
 2 opposed to the complete lack of alleged activity in Oregon by
 3 Glowacki), courts have held the minimal activities were insuffi-
 4 cient to confer personal jurisdiction. See, e.g., *Sidco, supra*;
 5 *Pacific Cornetta, Inc. v. Jung*, 218 F.R.D. 250, 255 (D. Or. 2003)
 6 (Haggerty, J.); *EQ Solutions, LLC v. Funk*, 2004 WL 816850, at *1
 7 (D. Or. Apr. 14, 2004) (Coffin, M.J.) (all dismissing individual
 8 defendants whose minimal activities in Oregon were only conducted
 9 in their capacities as corporate representatives).

10 Accordingly, Glowacki's motion to dismiss this action for lack
 11 of personal jurisdiction is **granted**. However, the dismissal is
 12 **without prejudice**, recognizing that as discovery progresses in the
 13 case, additional evidence may come to light regarding Glowacki's
 14 individual actions within the state.

15

16 **MOTION TO TRANSFER VENUE**

17 Glow claims it "does not regularly engage in business in
 18 Oregon"; "has few customers, transacted little business, and has no
 19 regular contacts with the state of Oregon"; "does not reside, or
 20 regularly conduct business, in Oregon"; and "does not have a
 21 regular or established place of business in Oregon." Dkt. #32,
 22 p. 3 (citing Dkt. #33, Affidavit of Jason Glowacki). Glow argues
 23 that even if venue is proper in this court, the court should
 24 exercise its discretion to transfer the case to the District of
 25 Ohio, where, according to Glow, the case could have been brought,
 26 and where all of Glow's witnesses reside. Glow maintains that its
 27 sale of eleven pipes to two Oregon customers for a total of \$68.50,
 28 "does not justify dragging Glow Ohio, its President, its employees,

1 and likely other witnesses literally across the county[sic] to an
 2 Oregon court." Dkt. #32, p. 8. Glow argues the dollar amount of
 3 its sales to Oregon customers is "so low that it really offends the
 4 traditional notions of justice" to require Glow to defend the
 5 action in Oregon. *Id.*

6 Exact argues Glow's sale of the allegedly counterfeit pipes to
 7 Oregon customers has created "actual and potential customer
 8 confusion as to the source of the goods . . . in Oregon," and Glow
 9 is "engaged in substantial and not isolated activities in Oregon."
 10 Dkt. #35, p. 2. Exact notes Glow has not challenged personal
 11 jurisdiction in this court, and Glow is considered a "resident" of
 12 Oregon under 28 U.S.C. § 1391(b)(1)¹ and (c)(2)². *Id.*, p. 6.
 13 Although Glow does not contest its status as an Oregon "resident"
 14 for purposes of section 1391(b)(1), Glow notes Glowacki is not a
 15 resident of Oregon, under any interpretation, defeating Exact's
 16 argument that venue is proper under that subsection. Glow further
 17 argues venue is not proper in Oregon under section 1391(b)(2)³,
 18 based on Glow's limited activities within the State.

19

20 ¹"A civil action may be brought in . . . a judicial district
 21 in which any defendant resides, if all defendants are residents of
 22 the State in which the district is located[.]" 28 U.S.C.
 22 § 1391(b)(1).

23 ²"For all venue purposes . . . an entity with the capacity to
 24 sue and be sued in its common name under applicable law, whether or
 25 not incorporated, shall be deemed to reside, if a defendant, in any
 26 judicial district in which such defendant is subject to the court's
 27 personal jurisdiction with respect to the civil action in ques-
 28 tion. . . ." 28 U.S.C. § 1391(c)(2).

29 ³"A civil action may be brought in . . . a judicial district
 30 in which a substantial part of the events or omissions giving rise
 31 to the claim occurred, or a substantial part of property that is
 32 the subject of the action is situated[.]" 28 U.S.C. § 1391(b)(2).

1 Despite the court's finding that it lacks personal jurisdiction
2 over Glowacki, the court still must determine the venue
3 issue on the basis of the Complaint as-filed. "Venue is to be
4 determined as of the time the complaint was filed and is not
5 affected by a subsequent change of parties." *Sidco Industries,*
6 *Inc. v. Wimar Tahoe Corp.*, 768 F. Supp. 1343, 1346 (D. Or. 1991)
7 (Frye, J.) (citing *Exxon Corp. v. Fed. Trade Comm'n*, 588 F.2d 895,
8 899 (3d Cir. 1978)). Because both defendants are not residents of
9 Oregon, venue cannot be based on 28 U.S.C. § 1391(b) (1).⁴ Thus,
10 the court looks to subsection (b) (2) to determine, at the outset,
11 whether venue is proper in this court. *Id.*

12 Under subsection (b) (2), venue is proper in any "judicial
13 district in which a substantial part of the events or omissions
14 giving rise to the claim occurred, or a substantial part of property
15 that is the subject of the action is situated[.]" 28 U.S.C.
16 § 1391(b) (2). With regard to the "events . . . giving rise to the
17 claim," in a trademark action, such as this one, "'the wrong takes
18 place . . . where the passing off occurs, i.e., where the deceived
19 customer buys the defendant's product in the belief that he is
20 buying the plaintiff's.'" *Sidco*, 768 F. Supp. at 1346 (quoting
21 *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633, 639 (2d Cir.
22 1956)); see *Woodke v. Dahm*, 873 F. Supp. 179, 197-99 (N.D. Iowa
23 1995) (cataloguing cases; noting the "rule that venue lies where
24 the 'passing off' occurred" is the traditional test; and finding
25 the rule still viable after amendments to section 1391(b) (2)). In
26 the present case, Exact has alleged that offending sales were made
27

28 ⁴See note 1, *supra*.

1 in Oregon. By "purposefully avail[ing] itself of the privilege of
 2 conducting activities" within Oregon, Glow had "clear notice" that
 3 it was subject to suit here. *World-Wide Volkswagen Corp. v.*
 4 *Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490
 5 (1980). I find, therefore, that venue is proper in this court.

6 However, even though venue is proper in this court, the court
 7 has discretion to transfer a civil action "[f]or the convenience of
 8 parties and witnesses, in the interest of justice, . . . to any
 9 other district . . . where it might have been brought[.]" 28
 10 U.S.C. § 1404(a). Glow's motion to transfer venue, therefore,
 11 really hinges on the convenience of the forum. See *Leroy v. Great*
12 Western United Corp., 443 U.S. 173, 180, 99 S. Ct. 2710, 2715, 61
 13 L. Ed. 2d 464 (1979) ("[V]enue . . . is primarily a matter of
 14 choosing a convenient forum.") (citing C. Wright, A. Miller, &
 15 E. Cooper, *Federal Prac. & Proc.* § 3801, pp. 506 (1976)). Although
 16 28 U.S.C. § 1404(a) somewhat "displaces the common law doctrine of
 17 *forum non conveniens*," similar considerations are useful in
 18 deciding a motion to transfer under that section. *Decker Coal Co.*
 19 *v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986).
 20 "Section 1404(a) is intended to place discretion in the district
 21 court to adjudicate motions for transfer according to an 'individu-
 22 alized, case-by-case consideration of convenience and fairness.'" *23 Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 29, 108
 24 S. Ct. 2239, 2244, 101 L. Ed. 2d 22 (1988) (quoting *Van Dusen v.*
 25 *Barrack*, 376 U.S. 612, 622, 84 S. Ct. 805, 812, 11 L. Ed. 2d 945
 26 (1964)). The court is charged with balancing "the preference
 27 accorded plaintiff's choice of forum with the burden of litigating
 28 in an inconvenient forum." *Decker Coal Co. v. Commonwealth Edison*

1 Co., 805 F.2d 834, 843 (9th Cir. 1986) (citations omitted); accord
2 *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir.
3 2000). Notably, “[t]he defendant must make a strong showing of
4 inconvenience to warrant upsetting the plaintiff’s choice of
5 forum.” *Decker*, 805 F.2d at 843.

6 In conducting this balancing of interests, the courts have
7 considered a number of factors as relevant to the determination of
8 a proper forum. These factors are similar to those the court
9 weighs to determine jurisdictional issues. Eight factors that have
10 been identified by the Ninth Circuit include: “(1) plaintiff’s
11 choice of forum, (2) convenience to the parties, (3) convenience to
12 the witnesses, (4) ease of access to evidence, (5) familiarity of
13 each forum with the applicable law, (6) feasibility of consolida-
14 tion of other claims, (7) local interest in the controversy, and
15 (8) the relative court congestion and time of trial in each forum.”
16 *Benchmade Knife Co. v. Benson*, 2010 WL 988465, at *6 (D. Or.
17 Mar. 15, 2010) (Haggerty, J.) (citing *Decker*, *supra*). If the
18 balance of these factors is relatively even, “the law favors
19 deference toward the plaintiff’s choice of forum.” *Adidas America,*
20 *Inc. v. Herbalife Intern., Inc.*, 2010 WL 596584, at *7 (D. Or.
21 Feb. 12, 2010) (Mosman, J.) (citing *Dole Food Co. v. Watts*, 303
22 F.3d 1104, 1117 (9th Cir. 2002)). The standard to defeat the
23 plaintiff’s chosen forum is high: the defendant must make “a clear
24 showing of facts which . . . establish such oppression and vexation
25 of a defendant as to be out of proportion to plaintiff’s conveni-
26 ence, which may be shown to be slight or nonexistent.” *Dole Food*
27 *Co. v. Watts*, 303 F.3d 1104, 1118 (9th Cir. 2002) (internal
28 quotation marks, brackets, and citations omitted). Indeed, the

1 *Dole Food* court observed that the doctrine of inconvenient forum
2 "is 'an exceptional tool to be employed sparingly, [not a] . . .
3 doctrine that compels plaintiffs to choose the optimal forum for
4 their claim.'" *Id.* (quoting *Ravelo Monegro v. Rosa*, 211 F.3d 509,
5 514 (9th Cir. 2000)).

6 None of the factors listed by the *Benchmade Knife* court weighs
7 strongly in Glow's favor. This is the forum selected by the
8 plaintiff. The convenience to the parties is equal; i.e., Oregon
9 is inconvenient for Glow, and Ohio would be inconvenient for Exact.
10 There are witnesses in both states. Concerns regarding inconveni-
11 ence to Glow's witnesses, or to difficulties in compelling their
12 appearance for trial in Oregon, can be resolved easily by the
13 taking of trial depositions in Ohio, or elsewhere. Most of Glow's
14 witnesses seem to be affiliated with Glow, and thus are likely to
15 be cooperative. Evidence also exists in both states, and
16 traditional discovery methods will make the evidence equally
17 accessible to both parties. To the extent Exact's claims arise
18 under federal law, both courts have equal familiarity with the law.
19 However, Exact also brings claims under Oregon law, with which this
20 court has greater familiarity than the District of Ohio. The last
21 three factors have little or no relevance here. In short, applying
22 these factors to the present case leads to the conclusion that Glow
23 has not shown a degree of "oppression and vexation" that is
24 sufficiently out of proportion to Exact's choice or forum.

25 Accordingly, Glow's motion to transfer venue is **denied**.

26 / / /

27 / / /

28 / / /

CONCLUSION

2 For the reasons discussed above, the defendant Jason
3 Glowacki's motion to dismiss for lack of personal jurisdiction
4 (Dkt. #36) is **granted**, and this case is **dismissed without prejudice**
5 as to Jason Glowacki.

6 The defendant Glow Industries, Inc.'s motion to transfer venue
7 (Dkt. #31) is **denied**.

8 IT IS SO ORDERED.

Dated this 20th day of August, 2012.

/s/ Dennis J. Hubel

Dennis James Hubel
United States Magistrate Judge